

# Protecting journalistic sources – Guardian of the democratic society on the brink of breaking a law?

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*“Thus it is that all journalists are, in the very nature of their calling, alarmists; and this is their way of giving interest to what they write. Herein they are like little dogs; if anything stirs, they immediately set up a shrill bark.”*

Arthur Schopenhauer, *Parerga and Paralipomena*, 1851

*“Journalism can never be silent: that is its greatest virtue and its greatest fault.”*

- Henry Anatole Grunwald

Media is often considered to be the fourth pillar of democracy. However, unlike the traditional branches of government, it is not constrained in formal frames; it is more flexible and it has more power. People see the world through media.

History has shown us the results of the misuse of media power, and from this we know to be aware that free media is a blessing on the one hand and a curse on the other. Journalists are described as public watchdogs. They inform the society, raise hot issues, criticize government and thrive on challenges. In order to perform their functions, journalists need a set of rights and a high level of protection.

Freedom of expression lies at the very core of media activities, and without it journalists would lose their virtue. But it is not absolute and it certainly should not be understood as such. The unresolved challenge is to draw the line, in order to know what this right encompasses and where it stops. The rights granted to journalists should not be used to justify illegal actions and infringe on the rights of others. But this dividing line is blurred and needs to be addressed in order to be understood.

Plenty of scholars dedicate their precious time to exploring these issues, suggesting solutions and providing a theoretical basis and justification. Although quite tempting, this article does not provide the theoretical background or examine developments in this sphere, but instead tries to make assumptions based on some of the most popular cases of the European Court of Human Rights (ECHR). The main topic is the protection of journalistic sources, including how this has been addressed and where future development may lie. The article also includes consideration of how the protection of sources affects the performance of journalists, the attitudes of society towards them, and what is expected of them.

Protection of journalistic sources is one of the most popular topics not only in Georgia but also abroad, as it guarantees the freedom to obtain and share information without undue constraints. In *Goodwin v. the United Kingdom*,<sup>1</sup> the Grand Chamber of the ECHR ruled that requiring a journalist to reveal the identity of his source violated article 10 of the European Convention on

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<sup>1</sup> <http://hudoc.echr.coe.int/eng?i=001-57974>

Human Rights. The journalist was supplied with financial information from a confidential corporate plan. This was a threat to the private company as their refinancing negotiations were not yet over. So, it was asserted that it was in the interest of justice to make the journalist reveal the source of the information. The ECHR stated that even though the disclosure order was based on law and pursued a legitimate aim, interference was not necessary in a democratic society. Thus, public interest overrode the interests of the private company and hypothetical fairness.

In *Ernst and Others v. Belgium*,<sup>2</sup> the Court had to decide whether searches and seizures conducted at a newspaper's offices and the homes of journalists constituted a violation of article 10 of the Convention. There was a leak of information about a highly sensitive murder case and there was suspicion that the information was disclosed by a member of police or the judiciary. The national court justified its approach as it was prescribed by law, on grounds that it served the purpose of preventing the disclosure of confidential information and maintaining authority and impartiality of the judiciary. The ECHR discussed the abovementioned arguments and came to the conclusion that the conducted searches and seizures were not proportionate to the pursued aims and that the investigative powers granted were too broad. Thus, it found a violation of freedom of expression.

One of the most controversial and well-known cases is *Stoll v. Switzerland*,<sup>3</sup> which went all the way to the Grand Chamber and caused heated argument within the ECHR. The Swiss ambassador to the United States drew up a confidential strategic document which dealt with the issues of possible compensation to holocaust victims. It was sent to the federal department of foreign affairs and to certain persons. A journalist apparently obtained this information as a result of someone breaching their confidentiality obligations, and published extracts in two articles. It was also argued that the journalist intentionally shortened and misrepresented information to make it more sensational.

The journalist was found guilty of infringing the Swiss criminal code, namely for the breach of confidence of official secrets or acting as an accomplice. The ECHR held by a majority of votes that there was a violation of article 10 of the Convention. The Court argued that the published information was of public interest and the fact that it was part of confidential diplomatic information was not sufficient to restrict the freedom of expression. It argued that media performed the role of public watchdog and this was not achieved at the cost of undermining the very foundations of the State.

Apparently, the Court was of the opinion that public interest was of more value to society and state than keeping confidential and possibly vulnerable information secret. Furthermore, the Court stated that such action would have a debilitating effect on the future actions of journalists and hinder the development of free media.

As for presenting some extracts in a sensational manner, the Court argued that it was in the sphere of freedom of expression and served a legitimate purpose. Judges with dissenting opinions stated that the journalist should have respected confidentiality of the abovementioned

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<sup>2</sup> *Ernst and Others v. Belgium*, application no. 33400/96, Press release issued by the Registrar

<sup>3</sup> <http://hudoc.echr.coe.int/eng?i=001-75189>

document and his actions showed a lack of professionalism and disregarded journalistic ethics. They also argued that the published articles did not actually have a huge impact on the public and did not contribute to future debates. The case reached the Grand Chamber, which overruled the violation of article 10 of the European Convention by a majority decision.<sup>4</sup> The court recognized that information may have raised public interest but that at stake was the successful conduct of diplomatic relations and State interest, which seemed to be more valuable. As for the journalist, he may not have acted illegally, but he most certainly did not act in good faith. Even though having taken into consideration the misleading character of the published information, the Court ruled that there was no violation of article 10 of the Convention. Dissenting judges stated abovementioned arguments and emphasized the importance of free media in a democratic society.

The last case I would like to review is *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*.<sup>5</sup> The ECHR stated that telephone tapping and surveillance of journalists in order to discover their sources did not rest on a legal basis and constituted infringement of article 10 of the European Convention. Journalists published articles claiming that secret information about the mafia had been leaked. The journalists were ordered to reveal the information and sources by the police investigation department and they were also subject to the abovementioned actions. At the national level, it was argued that those actions were prescribed by law and that they were necessary and proportional. The ECHR stated that before the use of telephone tapping or surveillance there should have been an ex ante review by a court, judge or independent body, but that this was not carried out in this case. As for the order to reveal the leaked documents, it may have been lawful with a legitimate aim, but it was not necessary in a democratic society and it unduly interfered with the right of journalists to protect their sources.

Are there lessons to be learned? The protection of journalistic sources is essential for free media. Revealing such sources will raise doubts towards journalists and have a chilling effect on their future activities. They will not be able to obtain reliable information and will gradually lose their purpose of existence – providing the public with valuable information and performing the role of ‘alarmist.’

This right is not absolute in itself. There are some limitations, but every case should be examined individually, thoroughly and with utmost scrutiny. Is it possible to draw the perfect line between protection of source on the one hand and the rights of others on the other hand? We have seen that prescription by law, having legitimate aim, protecting authority of judiciary and secrecy of information does not suffice to outweigh public interest and the consideration that something is necessary in a democratic society. The notion of necessity belongs to the category that has to be assessed.

The one thing that we all may agree about is that rights granted to journalists and their ability to protect the sources of their information should be as broad as possible. Otherwise, we will push journalists towards edges and transform them from wild public watchdogs to tamed domestic puppies.

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<sup>4</sup> <http://hudoc.echr.coe.int/eng?i=001-83870>

<sup>5</sup> <http://hudoc.echr.coe.int/eng?i=001-114439>